IN THE

Supreme Court of the United States

No. 129 of October Term, 1922

OSAKA SHOSEN KAISHA, a corporation, CLAIMANT OF THE JAPANESE STEAMSHIP "SAIGON MARU," HER TACKLE, APPAREL, ETC., and UNITED STATES FIDELITY COMPANY, a corporation,
Petitioners,

v.

PACIFIC EXPORT LUMBER COMPANY, a corporation,
Respondent.

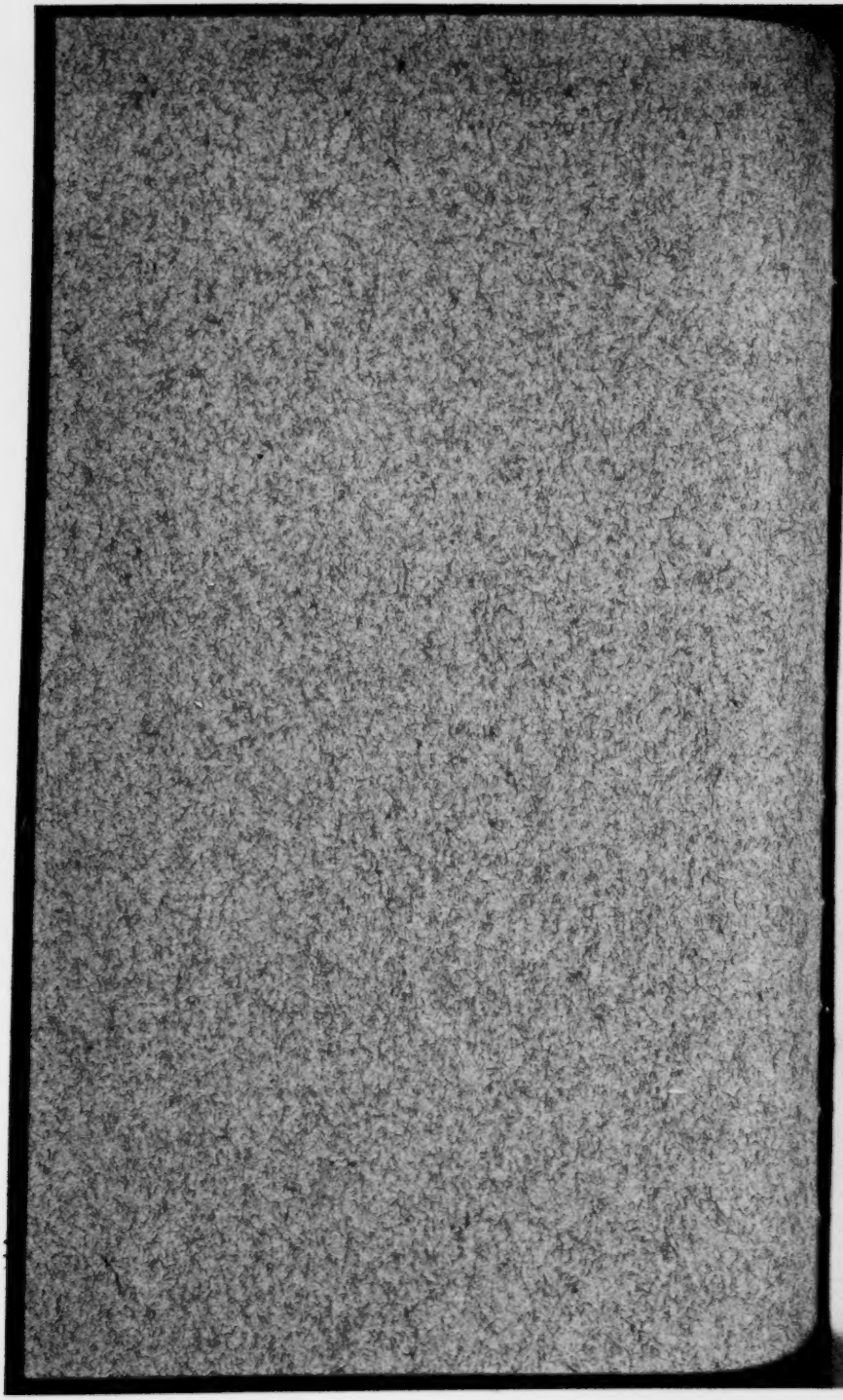
Brief of Respondent

On Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

ERSKINE WOOD,
Proctor for Respondent.

FRANK A. HUFFER,
WILLIAM H. HAYDEN,
GERALD H. BUCEY,
Proctors for Petitioners.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND



INDEX TO CITATIONS, CASES CITED IN BRIEF

INDEX TO BRIEF

In the

Supreme Court of the United States

No. 129 of October Term, 1922

OSAKA SHOSEN KAISHA, a corporation, CLAIMANT OF THE JAPANESE STEAMSHIP "SAIGON MARU," HER TACKLE, APPAREL, ETC., and UNITED STATES FIDELITY COMPANY, a corporation,

Petitioners,

v.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Respondent.

Brief of Respondent

On Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

STATEMENT

The concisest possible statement of this case is this:

Respondent sold a cargo of lumber to Gillanders, Arbuthnot & Company, of Bombay, and chartered the SAIGON MARU to carry it from Portland to Bombay.

The SAIGON MARU, though obligated by the charter party to take a full cargo, including deck load, took on a part cargo but refused to carry a full deck load.

Respondent libeled the ship for this breach of the charter, claiming as damages—1st, its loss of profits on the sale to Gillanders, and, 2nd, the amount it owed Gillanders as damages for not delivering a full cargo.

The District Court gave a decree for respondent, which was affirmed on appeal and petitioners now bring the case here on writ of certiorari.

The petitioners now urge three main points:

First. That respondent has mistaken its remedy in proceeding against the Saigon *in rem,* since, so petitioners say, there is no maritime lien on the ship for failure to take a full deck load.

Second. That she did take a full deck load.

Third. That the measure of damages adopted by the courts below was wrong.

The first and third points raise interesting questions of law, and will be discussed. The second is a question of fact as to which petitioners are concluded, unless the decision was clearly against the weight of the evidence. As it was not, this point will not require much discussion.

In the opening paragraph of petitioner's brief counsel say that the lumber which the SAIGON MARU left behind was not in existence—had not been sawn by the mill. And it is true the opinion of the circuit court of appeals so states. The point is not, in our view, material, and has never been argued. We doubt, however, the correctness of

the statement, and ask counsel to point out the evidence to support it. The mill was cutting out this cargo for the ship. Presumably it would, in its cutting, keep well ahead of the ship's loading of the lumber, so as to avoid the possibility of delaying the ship by failing to have ample lumber alongside. In these days of the war, ships were so valuable that a day's delay meant several thousands of dollars. It is not likely that the mill would risk that. It is more probable that the lumber, or most of it, *was* cut and waiting for the ship to take it. This is in part borne out by the testimony of Genereaux, Ap., p. 132, that after the Japanese captain had refused to take any more deckload, the marine surveyors asked permission to swing the four cargo booms out and *hang a sling load of lumber on the end of each boom* to test the stability of the ship. Some lumber must have been alongside then or the surveyors would not have made this request. They could not have referred to lumber already loaded, for that would have been lashed into the deckload. I do not wish to labor this point, for I do not regard it as important, but do not care to let counsel's statement pass unchallenged.

ARGUMENT

THERE IS A LIEN ON THE SHIP ENFORCEABLE IN A SUIT IN REM.

1st, Under the General Maritime Law.

The SAIGON MARU took on board 2,436,851 feet of lumber under deck and 241,559 feet on deck, at which time the captain refused to take any more and sawed off the stanchions placed to hold the deck load, thus making the loading of any more impossible.

Our contention is that the moment a ship enters upon the performance of her charter by taking even a small part of the cargo on board, she binds herself to the performance of her contract just as if she were a living being; that her taking on part of the cargo is her signature to the contract, so that whereas prior to that act, only her owner was liable in personam, after that act she herself becomes liable in rem; in other words, a maritime lien in favor of the charter has arisen against her.

Our opponents, building up their case on the maxim that the ship is bound to the cargo and the cargo to the ship, say that it is impossible there should be a lien on the Saigon for leaving part of the lumber behind, because the ship had no lien on this left-behind cargo, and that unless there is such reciprocity of liens there can be no lien at all.

The point is an interesting one that has never been passed upon by this court, though we think

the current of authority as it may be followed through the history of maritime law is in our favor.

We propose now to trace that current.

The Consulato de la Mer says, in Chapter 209:

"Every agreement which a managing owner of a ship or vessel shall make or shall have made with merchants or with his mariners, or with others who are connected with the ship or vessel, it is incumbent that he observe it without any dispute. And if by chance the said managing owner of the ship or vessel shall not be willing to observe that agreement or promise, he is bound to make good all the loss which the above mentioned parties shall sustain, or shall have sustained, or expect to sustain, without any dispute, *even if the said ship or vessel shall have to be sold.*"

Note that this would include selling the shares of the other owners to make good the agreements made by the *managing owner,* on behalf of the *ship.*

This comes within the definition of a maritime lien as given by Benedict, 4th Ed. Sec. 131, where he says:

"The maritime lien is an appropriation of the ship as a security for a debt or claim, such appropriation being made by the law; the law creates a remedy for the claim against the ship herself and rests in the creditor a special prop-

erty in her, which subsists from the moment the debt arises, and follows the ship into the hands of an innocent purchaser. Pothier describes a hypothecation to be 'the right which a creditor has in a thing of another, which right consists in the power to cause that thing to be sold, in order to have the debt paid out of the price.' "

The marine ordinances of Louis XIV, in the part headed Maritime Contracts, say, in Section XI of Title First:

> "The ship, rigging and tackle, and the freight and goods laded, shall be respectively affected (affectée, bound) by the conventions of the charter party."

It is true that Mr. Justice Grier, in THE YANKEE BLADE, 19 How. 82, 15 L. ed. 554, says that this only refers to an executed contract, but certainly the language leaves this doubtful.

(I cannot find in the Role d'Oleron, The Laws of Wisbuy or The Laws of the Hanseatic League any specific reference to this point.)

I have cited these instances of the old Continental Codes as being of interest since those codes form the source of so much of our own admiralty law today. But of course I recognize that where our own courts have made distinct departures from that law, the decisions of our own courts are the final rule and must be followed. And I concede that the old continental maritime law, that a ship was liable

for breach of an executory contract of affreightment, has been modified in this country to the extent that she is no longer liable in rem when the contract remains wholly executory. But, I contend, that is the extent of the modification; and where a ship partly executes the contract, as by taking on part of her cargo, she herself is liable for all breaches of the contract. My argument on this point may be summarized thus:

1. Under the old Continental Codes ships were liable in rem for breaches of contracts made by the managing owner on their behalf, including executory contracts of affreightment.

2. Even if this were not true such was certainly the law of this country as announced in the earlier decisions of our admiralty courts, up to time of THE FREEMAN, 18 How. 182, 15 L. ed. 341, and THE YANKEE BLADE, supra,—1856.

3. THE YANKEE BLADE and THE FREEMAN did not really settle the point, but they did contain dicta that a vessel was not liable for breach of a contract of affreightment which was purely executory.

4. In deference to this dicta of the Supreme Court the lower courts have decided that purely executory contracts do not bind the vessel.

5. But this is the limit of the extent to which the old law has been modified, and the lower courts, as if jealous to preserve that old law, in so far as the Supreme Court dicta will allow, have many

times held that where the vessel partly executes the contract as by taking on part of the cargo, she herself becomes liable in rem for all breaches of the contract.

6. The statement by counsel that the liens must be reciprocal, that the ship is bound to the cargo and the cargo to the ship, relates to the case where the cargo has been delivered to the ship, and is true so far as it goes. But it in no way contradicts the theory that the lien on the ship *may go further*. It is in no way inconsistent with the theory that she is liable for breaches of her *partly executed* contracts, even where she has no corresponding lien in return. There are many cases of liens on ships with no reciprocal lien in their favor. As witness breach of her contract to carry a passenger.

I will now trace the cases in this country showing the law to be as I have stated it. It will appear that in the early cases the most eminent admiralty judges we then had held the ship liable in rem for breach of contracts of affreightment, without regard to whether they were executed or executory.

Judge Ware so held in the REBECCA, decided in 1831, Ware's Reports, Second Edition, page 187. This was a leading case and long looked upon as one of the very highest authorities. Judge Ware again so held in the PARAGON, decided in 1836, Federal Case No. 10708. Both of these were cases where goods were actually shipped, but the decisions were not put on that ground, but on the ground that the

ship was liable in rem for every contract made by her master for her benefit.

Mr. Justice Storey, in the Schooner TRIBUNE, 3 Summer's Reports, page 144, decided in 1837, laid down the same rule, although he appears to have been influenced by the fact that a part of the cargo had been placed on board. He says at page 149:

> "A cargo for this part of the voyage was actually taken on board, and the voyage was voluntarily broken up at Frankfort by the claimants. Under these circumstances, it seems to me that the jurisdiction did attach, as the voyage was maritime, and the contract was maritime."

In the FLASH, decided in 1847 by Judge Betts, Abbott's Admiralty Reports, Vol. 1, page 67, the contract was to carry a cargo of bricks. The FLASH took on a portion of the cargo but refused to take on the rest and Judge Betts held her in rem, basing his decision, however, not alone on the fact that she had taken on a part of the cargo, but on the broader ground that a vessel is liable in rem for all contracts made for her benefit by her master in the scope of his authority.

In the PACIFIC, 1 Blatchford, page 569, decided in 1850, Mr. Justice Nelson on circuit held the ship liable in rem for a purely executory contract.

These cases were all before this court had decided the Schooner FREEMAN, 1855, and the YANKEE BLADE, 1856, in which this court, in

language which has been criticised by some very able judges as mere dicta, said that a vessel could not be liable in rem for breach of an executory contract. Among the criticisms of these dicta is that of Judge Lowell of Massachusetts who, in 1872, decided the case of *Oakes v. Richardson,* Lowell's decisions, Vol. II, page 173. He said at page 176:

> "The respondent contends that the jurisdiction does not attach until the goods have been shipped. The opinion in *Rich v. Parrott,* which he cites, contains no more than the intimation of a doubt, created by some more recent remarks in *Schooner Freeman v. Buckingham,* 18 How. 182, and *Vandewater v. Mills* (The Yankee Blade), 19 How. 82. In the former of these cases, there is a dictum (p. 188) that the law creates no lien on a vessel as security for the performance of a contract to deliver cargo until some lawful contract of affreightment is made and a cargo is shipped under it, and in the latter case that remark is quoted and called a decision of the court; and a like rule concerning the privilege against vessels is cited from Boulay Paty (19 How. 91), but I do not understand the point to be decided in either of these cases; because in the one the controlling situation was that no valid contract of affreightment had been made, the master having signed a bill of lading for goods that had never been on board his vessel, a fact which went quite beyond any question of

lien; and in the other case the contract was held to be one of partnership and not of affreightment, and for that reason to be out of the sphere of admiralty."

Notwithstanding the indecisive character of the remarks of the Supreme Court in the Schooner FREEMAN and the YANKEE BLADE, the lower courts have, with a single exception, followed the language in these cases and have held that breach of a contract of affreightment *wholly* executory creates no lien on the ship. The single exception is the case of the WILLIAMS, referred to in a moment; but while the lower courts, in deference to the Supreme Court, have receded from the advanced ground taken by the early cases, until it has now become practically settled in the maritime practice in this country that *executory* contracts are not enforcable in rem, still it has become equally well settled that the moment a ship enters upon the performance of the contract by taking a portion of the cargo aboard, or doing any other act which signifies her acceptance of the contract, she herself is bound to its performance and is liable in rem for its breach.

This rule has been announced in many cases and has become so definitely recognized that in many cases in the reports ships have been libelled in rem after taking a part of the cargo on board for refusal to take the balance, and the question of the liability of the ship has not even been seriously disputed.

The history of the decisions which I have attempted to give would not be complete without a mention of the WILLIAMS, decided in 1873 by Judge Emmons, in the eastern district of Michigan, 1 Brown's Admiralty Reports, page 208. A tug had been engaged to go to the assistance of the WILLIAMS to get her off where she had stranded, and before the tug arrived at the spot the WILLIAMS had got off. The tug libelled the WILLIAMS in rem for her compensation. Your Honors will note that the contract was partly performed by the tug going to the spot where the WILLIAMS had been. Judge Emmons, however, did not base his decision on that ground, but on the old and broader ground that the ship was liable in rem for all contracts made on her behalf. The opinion is elaborate and shows an exhaustive search of the authorities, and the proctor who contended for the liability in rem was Mr. H. B. Brown, afterwards associate justice of this Court. I have put the WILLIAMS in this brief slightly out of its chronological order because it is the only case which, after the Supreme Court decisions referred to, still adheres to the older doctrine of the earlier cases, and therefore belongs in the category of those cases.

Reverting now to the chronological order, the first case which followed these Supreme Court decisions is that of the

HERMITAGE decided in 1860 by Mr. Justice Nelson while on circuit, 4 Blatchford, 474. The

case was one of an executed contract. The Hermitage had taken on board and carried the cargo and libelled the cargo for freight. Mr. Justice Nelson in deference to the Supreme Court dicta reversed his own earlier holding in the Pacific and said that a purely executory contract would not be enforceable in rem, but he indicated clearly enough that where the ship had entered on the performance of the contract, as by taking a part of the cargo on board, she would be liable. He opens his opinion thus:

> "This case does not fall within that class of cases where nothing has been done under the charter of the vessel, that is, where no goods have been placed on board, and the voyage has not been entered upon; in which cases there can be no lien upon the vessel or cargo under the charter party."

The next case is that of THE IRA CHAFFEE, (2 Fed. Rep. 401) decided in 1880 in the eastern district of Michigan by Judge Brown, afterwards asociate justice of this Court. It is cited by counsel in his brief as authority for his proposition, but we think it does not sustain it. The case was one of a purely executory contract, the engagement having been to carry a certain boiler which was never put aboard the boat nor delivered to her master. Judge Brown said:

> "Whatever be the rule with regard to contracts of affreightment, which are purely executory,

> *it must now be considered as settled* that if the ship enters upon the performance of its work, or *any step* has been taken toward such performance, the ship becomes pledged to the complete execution of the contract and may be proceeded against in rem for nonperformance."

Judge Brown did not consider the Yankee Blade or the Freeman to have definitely settled the question even as to *purely executory contracts,* for he says, on page 402:

> "Prior to the decisions of the Supreme Court in the case of the Freeman * * * and the Yankee Blade * * * the question of jurisdiction in the cases of executory agreements was unsettled, and even these cases cannot be said to have definitely fixed the measure of liability. They seem rather to have announced in general terms a doctrine from which the Supreme Court has not as yet shown any disposition to recede."

Note that while Judge Brown considers the question of executory contracts as still not definitely settled, yet he considers cases of partly executed contracts, as where the ship has taken "any step" towards the performance as being definitely settled. in favor of a lien against the ship.

In The MONTE A, 12 Fed. Rep. 331, decided by Judge Brown of the southern district of New York

in 1882, which was a case of a wholly executory charter party, it is said:

> "The action in this case is brought for the breach of a contract of charter party wholly executory. The vessel never entered upon the performance of the contract *or any part of it.* In such cases it has been repeatedly declared by the Supreme Court that no lien exists upon the vessel." Citing The Freeman, The Yankee Blade, and The Keokuk, 9 Wallace, 517.

In the J. F. WARNER, 22 Fed. Rep. 342, decided in 1883, Judge Brown, referring to his earlier decision in *Scott v. The Ira Chaffee,* said: (pp. 344-345.)

> "I had occasion to hold that the owner of a cargo had no lien upon the vessel for the breach of a contract of affreightment until the cargo or *some portion* has been laden on board or delivered to the master."

In THE DIRECTOR, 26 Fed. Rep. 708, decided by Judge Deady in 1886, it is said at page 710:

> "But it must be understood that the vessel is not liable for a breach of a contract of affreightment so long as it is wholly executory, though the master and owner are. The Ira Chaffee, 2 Fed. Rep. 401. *But as soon as a performance of the contract has commenced a lien exists on the vessel in favor of the shipper or charterer,*

and a suit in rem may be maintained against the same for any liability of the master or owner arising on or growing out of said contract."

In THE MISSOURI, 30 Fed. Rep. 384, decided by Judge Coxe in 1887 in the northern district of New York, exceptions to the libel were sustained because

"the voyage was not undertaken, and *no part* of the cargo was placed on board."

In THE GUILIO, 34 Fed. Rep. 909, decided in 1888, the libel was against the Guilio for delay in proceeding to her destination and for not taking on board a *full cargo.* The case was before Judge Brown of the southern district of New York, and yet the opinion does not even suggest that a libel in rem would not lie in a case of this kind.

In THE STARLIGHT, 42 Fed. Rep. 167, decided in 1890 by Judge Pardee on appeal to the Circuit Court from the District Court of Florida, we have a case identical in all respects with the case at bar. The ship was chartered to carry a full and complete cargo of lumber, and after taking on a portion of the cargo sailed away without a full cargo. The shipper libelled her in rem for her failure to carry a full cargo and obtained a decree. It does not appear from the opinion whether the precise point now before the court was raised in that case. If it was not raised the case is still good authority as showing that it has become the settled understand-

ing of shippers, the bench and the bar, that where a ship has entered on the performance of her contract by taking on a portion of her cargo, she is liable in rem for her refusal to carry the balance of the cargo. It is this settled understanding, usage, custom, or whatever you are pleased to call it, indulged in by ships, shippers, proctors and judges, which really goes to make up maritime law.

In THE OSCODA, 66 Fed. Rep. 347, decided in 1895 by Judge Coxe of the northern district of New York, it is said:

> "The libellant seeks to enforce a lien upon the Propellor OSCODA for damages occasioned by the breach of a *partly executed* contract of towage. The exceptions dispute the jurisdiction of the court. I am of the opinion that the Propellor, having entered upon the agreement to tow libellant's barge during the entire season of 1894, is answerable in rem for the breach of the agreement by the abandonment of the barge in September."

In THE EUGENE, 83 Fed. Rep. 222, decided by Judge Hanford in the northern district of Washington in 1897, which was a suit in rem for breach of an executory contract to carry passengers, after a review of the authorities on exceptions to the libel, Judge Hanford, at page 224, used this language:

> "These authorities are conclusive upon the point that the right to proceed in rem for breach of a

contract of affreightment does not exist unless the cargo, *or a portion of it,* has been delivered to the master of the vessel, or to his authorized agent."

This was affirmed by the Circuit Court of Appeals, 87 Fed. Rep. 1001.

THE HELIOS, 108 Fed. Rep. 279, decided by Judge Thomas of the eastern district of New York in 1901, was a suit in rem against The Helios for breach of charter. She had been engaged to go to the West Indies and take on board the cargo of a wrecked vessel. She proceeded to the wreck and after taking on a portion of the cargo steamed away leaving the balance still lying in the wreck. She was held liable in rem.

THE OCEANO, 148 Fed. Rep. 131, decided by Judge Hough of the southern district of New York in 1906, was a case where a charterer had through an error made an over-payment of charter hire and sued the ship in rem to get it back. The jurisdiction was disputed. The court said on page 133:

"As soon as the performance of a charter party has commenced a lien exists on the vessel in favor of the shipper or charterer, and a suit in rem may be maintained for any liability of the master or owner arising therefrom."

The MARGARETHA, 167 Fed. Rep. 794, decided in 1909 by the Circuit Court of Appeals for the sec-

ond circuit, Judge Ward writing the opinion, was a case of a wholly executory contract. The court said:

> "The charter party *not having been entered upon* there was no right against the steamship in rem." Citing the Monte A.

Wilson et al v. Peninsula Bark & Lumber Company, 188 Fed. Rep. 52, decided by the Circuit Court of Appeals of the sixth circuit in 1911, Judge McCall writing the opinion, was a libel against the steamer MATTHEW WILSON and her owners for failure to carry a full cargo of lumber. The jurisdiction in rem was not even questioned.

In all these authorities one general doctrine appears, and that is that whatever the rule may be as to contracts wholly executory it is now settled that where a ship enters on the performance of a contract by doing any act which shows that she herself, as a living sentient being, accepts the contract and undertakes to perform it, as where she takes on a portion of the cargo, she herself becomes bound to its performance.

Against all the authorities which I have cited counsel cites really only one case, that of The SHELDON and The WATSON, which seems to need comment from me; for I do not consider the Supreme Court cases any more authority for his proposition than for mine. All that the Supreme Court cases say is that a lien will not lie for a purely executory contract, and none of them say that it will not lie for a partly executed contract. And so we come

to a discussion of The Sheldon and The Watson; and the moment the facts in these cases are understood their authority to support counsel's proposition disappears, for they were cases where the libel attempted to bind the various ships of a line *in solido* for breach of a contract of affreightment to carry goods by that line,—a position in admiralty law which the Circuit Court of Appeals truly characterizes as "extraordinary" and "heretofore unheard of." The facts in these cases were that The Sheldon and The Watson, two barges, had been chartered to make five voyages carrying coal, and each barge did make one voyage and then refused to make the others. They were to load in turn and apparently it made no difference to the shipper which barge loaded first so long as the cargo was carried. The Circuit Court of Appeals pointed out that it would be an absurd proposition to hold a vessel liable for failure to make a voyage upon which she had never entered because that would be contrary to the theory of the maritime law that the vessel as a living thing does not sign her name to the contract until she commences the voyage. A vessel, as such, is deemed to make the contract herself when she enters on its performance and she obviously, therefore, cannot make a contract for a future voyage. The Circuit Court of Appeal, 118 Fed. Rep. at page 952, used this language:

> "It has now become a settled practice, where several vessels make up a line, for the managers

to make contracts that the goods shall go forward by one or any other of the vessels of the line, depending on the times of arrival and other contingencies. It seems an extraordinary position, heretofore unheard of, that all the vessels of such a line can be held in solido for the breach of such contracts so far as executory, even if parts of the cargoes contracted for had been sent forward. Yet this is necessarily the fundamental principle underlying the position of the libellant in the cases before us. To permit liens to be sustained as claimed by it in solido against sundry vessels, would be to go entirely beyond the purpose of the admiralty law in granting them.

"The several vessels of a supposed line, and in this particular case, by analogy, the barges, so far as *voyages* not completed are concerned, are in no fault. The latter never entered into any contract, either expressly or by implication; but they well and truly performed such *voyages* as their owner directed them to perform. They should not be held liable for breaches of duty of merely their owners." * * *

And at the bottom of page 953, continuing, said:

" * * * to permit liens such as are now claimed would go beyond the necessities of the admiralty law, would extend liens in violation of the principles stated by Mr. Justice Curtis in The Kiersage, and would assess damages against a ves-

sel not a party to a contract for a particular *voyage* either directly *or by partial* execution of that voyage. As to the latter proposition we may well add that while, so far as the charterer and the owner of the barges were concerned, the charter was continuous, yet the vessels being inanimate, *could not,* by the very nature of things, enter into a strictly executory contract. Each of them could be subjected to such duties only as might arise by implication of law *from the circumstances of a voyage,* or other concrete act, on which *it had in fact entered;* and therefore, as to them, each of the several *voyages* was logically independent *and single.*"

It is perfectly apparent that the court here truly expressed the fundamental principle of the admiralty and maritime law that the vessel is herself a contractor from the moment she enters upon a voyage. She is treated as if she were a living thing who, by taking on board a portion of the cargo, has signed a contract to make the specified voyage; but obviously she cannot be held to have obligated herself for future voyages because she cannot, until each of these future voyages actually commences, do any possible act which will show her intention so to obligate herself. The voyage is the unit, so to speak, of the ship's activities. This has been the natural development from the early days of commerce when the voyage marked the completion and end of one employment of the ship.

She was a wanderer over the face of the earth looking for merchandise to carry and when she finished one voyage she looked around afresh for new employment and commenced a new venture. A modern time charter for a series of voyages is a modern development and has not changed the fundamental conception of the law when each voyage marked a separate unit in the ship's career. It is this conception, and also the fact that the ship cannot by any visible act show she binds herself to future voyages which led to the decision in The Sheldon and The Watson that the barges were not liable for failure to make unperformed voyages. But can there be any doubt as to what the holding would have been had the contract been for one voyage on which the barge had entered by taking on a portion of the cargo?

Stress is laid by counsel on the reciprocity between the liens of the cargo on the ship and the ship on the cargo. This is undoubtedly true to a certain extent, but it is only a statement of the old continental rule that the ship is bound to the merchandise and the merchandise to the ship, meaning that the ship has a lien on the cargo for freight and expenses connected with the safe carriage of the cargo, and the cargo has a lien on the ship for its safe carriage and delivery. This, however, is not at all inconsistent with the idea that the ship always is bound to the performance of a contract upon which she has herself entered, even in some cases where she might not have a lien at all. For

example, "All agreements for the carriage of *persons* or property by vessels are contracts of affreightment." Benedict, 4th Ed. §§ 199, 201. Yet where a passenger takes passage on a vessel and the vessel reecives him on board and commences the voyage but fails to complete it, she is liable in rem for her failure. Obviously here is a case where there can be no reciprocal lien, for there can be no lien on the passenger. Such cases are well known; one is the The Eugene, 83 Fed. Rep. 222, and another is *Stone v. The Relanpago,* Federal case 13,486. It is true in the latter case mention is made of the ship's having a lien on the passenger's baggage; but suppose there had been no baggage!

It is to be noted, moreover, in considering this reciprocal relation of liens that the lien of a vessel on her cargo is of an entirely different nature and origin from the lien of the cargo on the vessel. The lien of the cargo on the vessel is of a higher order. It is a jus in re and follows the ship into whosoever hands the ship goes. The lien on the cargo, upon the other hand, is not a jus in re but a mere possessory lien and is lost the moment the cargo leaves her possesion. The lien of the cargo is nothing more than the right to hold the goods until the freight is paid. 1 Ruling Case Law, page 456, being Section 56 of the article on admiralty.

It may be remarked here in passing that the lack of reciprocity of which petitioners complain does not, as a matter of fact, exist in this case.

That lack is supplied by the charter party itself which says, in clause N, "the vessel is to have a lien on cargo for all freight, *dead freight* and demurrage" Ap. 981. I do not for a moment think our position needs the support of this clause. I am convinced we have the lien without it. Certainly we should have it with it.

Counsel argues, at the bottom of page 55 of his brief, that if the decisions of the courts below in this case are allowed to stand, there will be no definite rule by which it can be determined in any given case whether or not a lien exists, and vessels will be subject to secret maritime liens "based upon occurrences not appearing to have any connection therewith." It is hardly necessary to point out that where a vessel enters upon the performance of her contract of affreightment by actually taking on a portion of her cargo, she has signified by as definite and conspicuous an act as it is possible for her to perform that she is undertaking a contract and is herself bound for its performance. You could hardly have a more definite rule or test than that. And the lien arising would be no more "secret" than a lien for seamen's wages, salvage, general average, collision, materials, supplies, repairs, necessaries, bottomry loans, pilotage, wharfage, or any other of the liens which a ship's activities may give rise to.

It would surely be a great miscarriage of justice to allow this Saigon Maru, after deliberately refus-

ing to receive part of the cargo, to then say that we had no lien on her because she had no lien on that part of the cargo which she herself had wrongfully refused. This would be to permit her to profit by her own wrong. Can it be supposed that a ship could part with her lien on her cargo by surrendering its possession and then when sued for damages to the cargo say, "I have no lien on the cargo and consequently you have no lien on me." The Saigon Maru here is making a contention which is equivalent to this, or worse; she says, "By my own act I refused to take this portion of the cargo, consequently I prevented myself from getting a lien on it, therefore you have no lien on me." A more utter failure of justice could hardly be imagined.

But, says counsel, a ship profits by her own wrong when she refuses to take any cargo at all, for here admittedly she cannot be sued in rem. True; she does. But that is no reason for making a bad matter worse, and extending the rule any further. Besides, where she has taken no cargo the charterer still has his cargo intact, and in normal times can usually fix another ship to take it. But he cannot do this when he has loaded most of his cargo and been drawn into the transaction so far he cannot get out, and then the ship leaves the rest of the cargo behind.

Admiralty law is made up of the "usages and customs of the sea," as announced by learned writers and interpreted and modified by our courts.

By the usages and customs of the sea, as found in the old codes, and by the decisions of our courts, the respondent has this lien in this case, and not only those cases where the point has been expressly adjudicated, but also those quite numerous cases where the lien has been taken for granted, are evidence of the acecpted law.

The Lien Under the Oregon Statute.

Basing our case, as we do principally upon the general maritime law, we do not propose to devote much space to this portion of the brief, but merely to comment on counsel's contention as shortly as possible.
this Court in *Southern Pacific Company v. Jensen,*

We concede at the outset that the decisions of 244 U. S. 205, 37 Sup. Ct. Rep. 524, and *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 149, 40 Sup. Ct. Rep. 438, declaring for uniformity in maritime law, weaken the case for a lien under the Oregon statute. But that is as far as our concession goes, and before applying to this case the doctrine of those cases, resting as they do on a different state of facts, we must have a direct decision of this Court telling us to do so. We can see no more reason for denying the lien under the state statute in this case, on the ground of lack of uniformity, than for denying it in those quite numerous death cases where the state statutes have been invoked to give a lien where the maritime law gave none.

Counsel's first contention is that the Oregon statute applies only to domestic vessels, and the Haytien Republic, 65 Fed. Rep. 120, decided by Judge Bellinger, supports him. The statute is section 7504 of Lord's Oregon Laws and says that "every boat or vessel used in navigating the waters of this state, or constructed in this state, shall be liable and subject to a lien for all damages accruing from the non-performance * * * of any contract of affreightment." This statute has been applied in the cases of The Aurora, 163 Fed. Rep. 633, and 178 Fed. Rep. 567, and The General Foy, 175 Fed. Rep. 590. The original records in the District Court of Oregon show that The Aurora was a California vessel, and The General Foy a French vessel, and the specific point that the vessels were foreign was raised by the exceptions though it does not seem to have been discussed in the opinions.

Counsel's other contention is that the statute if applied to foreign vessels is unconstitutional; in support of which he cites The Roanoke. The Roanoke was an aggravated case. The Washington statute under consideration gave material men *three years* in which to enforce their claims against a vessel. Bear in mind that, under the maritime law, liens must be enforced at the first reasonable opportunity or be lost as against other lienors. This feature of the Washington statute may be considered a gross infringement of the general maritime law, so much so as to make it unconstitu-

tional. Furthermore, in that case the ship owner had paid in full the contractors who did the work on the vessel, which point was emphasized by the Supreme Court. In The Roanoke the opinion was written by Mr. Justice Brown. He himself, however, when sitting as judge in the eastern district of Michigan, had decided in The J. F. Warner, 22 Fed. Rep. 342, that the statute of the state of Michigan, very similar to the Oregon statute, gave a lien on a vessel for breach of an executory contract of affreightment. The J. F. Warner was presumably a New York vessel, since the contract was made in New York, but this is not expressly stated.

There is nothing in The Roanoke to show that Judge Brown had changed his view since deciding The Warner, and as the issues in The Warner appear to have been the same as those now before us, and the issues in The Roanoke were not, The Warner must be given a gerat deal of weight.

In the case of THE ENERGIA, 124 Fed. 842, decided after The Roanoke, Judge Hanford upheld the Washington statute which is similar to the Oregon statute and enforced the statutory lien against the foreign vessel for breach of an executory contract of affreightment.

Amount of Deckload

This is petitioners' second point. They say the Saigon did take a full deck load and that the courts below were wrong in saying she did not. On this

question of fact, however, they are concluded unless the decision is clearly against the weight of the evidence.

The decision so clearly has the weight of evidence with it in the testimony of Mr. Wheelwright, Mr. Rothschild, the stevedore, and Captains McNaught, Genereaux and Hoben, marine surveyors, to say nothing of the admissions of Mr. Orrett and Captains Cullum, Yamamoto and Yamaguchi, that I do not propose to argue this point. If I thought it were open to question, I would contend for larger damages than the courts below allowed; for they held us down to 550,000 feet as constituting a full deckload, whereas we believe 750,000 feet would have been nearer the mark.

A word may be appropriate here in reference to what we cannot help regarding as a curious argument of counsel. It is that no matter how grossly Captain Yamamoto erred on the quantity of the deckload, yet, since the District Judge found that he acted in good faith, his decision, as master of the vessel, is binding. Counsel's argument may be summarized thus:

1. The court did not find Captain Yamamoto incompetent.

2. The court found that he acted in good faith.

3. Any decision of the master made in good faith, no matter how unwarranted by the facts, must stand.

Our first comment is that the District Court, in language softened as much as possible out of consideration for Captain Yamamoto's feelings and reputation *did* find that he was incompetent for this voyage. Else what means a finding that he had never in his life before carried a cargo of lumber and was *"unduly timid"?*

Our second comment is that it is *not* the law and never has been that the master has an unlimited discretion in saying when his ship is fully loaded. He *has* some discretion,—I admit it freely —and when he exercises it within bounds that commend themselves as reasonable, let us admit for the sake of this point, that it is controlling, (though he shares this discretion with the marine surveyor. See Orrett's letter *Apostles page 86.*) But when he steps outside those bounds, his decision is not binding and all the "good faith" in the world cannot make it so. An *honest* mistake can be so glaring as to amount to an abuse of discretion. Suppose this man of no experience in this lumber trade, and of excessive timidity, had said that his ship would take *no* deckload, or, as he *did* say at first, a deckload of only 175,000 feet, (Ap. 88) would any court be bound by that—no matter how honest he was? Of course not. This is not a case of tort, where good faith might become a question. It is a case of contract. The ship broke her contract to carry a full deckload. That she broke it "honestly" or in "good faith" is beside the point. I may decide in the best of good faith that I have a legal right

to pursue a certain course under a contract. But if, as a matter of fact, I had no such right, my honesty and good faith will not protect me.

I would willingly let poor Captain Yamamoto rest in peace, but counsel's objection to Judge Wolverton's characterization of him as "unduly timid" forces me to a short analysis of him.

He had never carried a lumber cargo in his life before, and his lack of knowledge of how such a cargo is carried caused a timidity on his part which was at the bottom of the whole trouble in this case. He conjured up in his imagination things that *possibly* could conceivably happen, until they took on in his mind the form of probabilities or things that were to be expected, and instead of being the intrepid, resourceful seaman that he should have been to occupy the position he held, he became like a boy, frightened at his own imagination. The steering rods became to him a *probable* source of danger, although he knew nothing of the manner of securing a deckload, and all the knowledge and experience of the marine surveyors, the stevedore and Mr. Wheelwright, who had loaded thousands of deckloads from ten to fourteen feet high, some on ships with steering rods like his, meant nothing to him. He brushed it aside as if it were folly. He drew on his imagination until typhoons in the China Sea became to him an almost certainty, and he even testified that he expected to meet a *"terrible typhoon"* (i. e., the worst kind) three or four times during July (Ap. p. 723) al-

though the hydrographic chart for July, 1919, (marked twice as Claimant's Exhibit "L" and Claimant's Exhibit "I") shows that there have only been thirteen typhoons in these waters in July in *eleven years.* Yet according to the captain's "three or four times during July" there would have been in this time thirty-three to thirty-four of such storms. He ignored entirely the fact that typhoons always give twenty-four hours' notice of their approach (Ap. pp. 576, 519); that it is always possible to run from them unless you are cramped for room (Ap. p. 519); that the only place he would be cramped for room would be going through the Straits of Formosa (Ap. p. 576 and charts) which he would pass in one day (Ap. p. 575) and that he would pass through the whole typhoon area and be completely out of it in only eight days (see Claimant's Exhibit Yamamoto No. 2, where the red line marks his voyage with the noon position each day, and where Captain Cullum has marked the typhoon limits).

The southwest monsoon became to Captain Yamamoto a terribly dangerous sea (Ap. p. 721) which "must" shift his deckload against his steering rods and break them (Ap. pp. 736-737) and render his ship unstable, although the fact is that the monsoon sea is nothing more than "a little chop" as stated by Captain Hoben (Ap. p. 260) and practically agreed to by Captain Cullum (Ap. pp. 538-539) with a wind velocity of only five or six (Ap. pp. 538-539)—nothing comparable to voyages

across the Pacific in bad weather,—and notwithstanding the further fact that the voyage from Achen Head to Bombay, which is the whole of the monsoon part of the voyage, only took him thirteen days, with Colombo as a halfway port in case of necessity, so that he was, at this stage, never more than three days from a port of refuge. (See charts.)

Asked if, in the very remote contingency that anything should happen to his steering rods, he could not use his hand gear, his answer was "No," that that would be "impossible" (Ap. p. 744) and "very dangerous" and a man could not stand at the wheel in stormy weather (Ap. p. 744), notwithstanding the fact that the ships of the world all used to be steered by hand gear and they are all steered by that now in case of anything happening to the other gear. That is what the hand gear is for. Yet to Captain Yamamoto is was apparently a useless ornament. A resourceful man, a man who combined with prudence a certain amount of initiative such as we would expect from a sea captain, would have said "Yes, I could use my hand steering gear. It might be a little difficult to connect it in a very bad storm, but I could do it with the use of relieving tackles, and if necessary I could lash a couple of men to the wheel to keep them from being washed overboard." That's been done more than once, yet to Captain Yamamoto such a thing was so "very dangerous" that he could not even consider it.

He took at least two hundred tons more coal from Portland than there was any necessity for, and he actually arrived at Bombay with five hundred tons of coal in his bunkers, all of which reduced his cargo carrying capacity by that much.

His timidity had combined with it that absolute obstinacy that sometimes goes with abnormal fear and was illustrated by his refusal even to listen to Mr. Orrett, his own agent, to the protests of the libelant, to the arguments of the marine surveyors, to their requests to empty one or two ballast tanks or to lift some sling loads of lumber off the docks at the ends of the ships' booms. Nothing of this would he do and his obstinacy reached its culmination when he sawed off the stanchions and said he would not carry another stick. Conceding that a captain has some discretion as to the amount of cargo he shall carry, this captain's actions throughout amounted to an abuse of that discretion. If the man had had any experience with lumber cargoes he would have been different, but he had not.

The remarks which Judge Thomas applied to the captain of the "Helios," 108 Fed. Rep. 279, 284, can be applied with equal force to Captain Yamamoto. The "Helios" had been chartered to go to a coral reef in the West Indies and there load iron rails as they were taken out of a wreck. In the midst of the operations the captain of the "Helios" lifted anchor and steamed off with only half a cargo

because he was fearful of his anchorage ground about the reef and of possible hurricanes that would be expected in June and July. The court said:

> "The conclusion cannot be escaped that the captain was timorous, rather than conservative and duly cautious; that he was too expectant of possible harm to his vessel, chartered for use on or about a coral reef, and too indifferent to the pecuniary sacrifice his departure entailed upon the libelant in the premature dissolution of the enterprise after the great expense of initiating it, and that he shut his eyes too readily and obstinately to all resources suggested to him, or of which he should have been cognizant. * * * * * Undoubtedly danger lurks in all things, yet seamen undertaking adventures in tropical regions are not expected to experience the dismay that would come to the inexperienced, but rather to be intrepid, resourceful, and helpful. The captain's consciousness of the possible, but improbable, to a degree ruined the enterprise, and so far compensation should be made."

In this same case the court said, top of page 283, that whether hurricanes were to be expected in June and July in that region or not, "in any case, the vessel was chartered for those very months, for those very waters, and that very reef," and should have done what she was chartered to do.

Applying that to the case in hand, the Saigon Maru was chartered to carry a *full* deckload of lumber for this *very* voyage to Bombay in these *very* months of June, July and August, and if there were any such dangers as Yamamoto said there were, the owners of the vessel knew of them at the time they chartered her and cannot break up the enterprise of respondent and entail heavy pecuniary loss on it by failing to carry a full deckload to the very port and in the very months that they had agreed on.

It is an interesting commentary on Captain Yamamoto's apprehensions, that the log shows an utterly calm and peaceful voyage from Portland clear to Bombay,—a monotonous voyage.

Was the Vessel Seaworthy?

In view of the finding by the courts below that the Saigon Maru did not take a full deckload, the question of her seaworthiness is probably now immaterial. But that it may not be entirely lost sight of, I will say here that the charter party *warrants* the vessel *seaworthy* to carry *this cargo*, including a *full deckload* on *this voyage*. (Ap. pp. 977-978.) And if all Captain Yamamoto says about his ship is true, she was not seaworthy and that was a breach of the charter party for which the ship is liable.

See his testimony regarding his ship's tenderness, Ap. 728, 745, 748-749, 774-775, as affected by her ballast tanks Ap. 775-777, and his testimony generally about his steering rods, Ap. 736-737, 781, and elsewhere.

THE DAMAGES.

This is petitioners' third point: They complain that the proper measure of damages was not used. By adopting the measure used in other cases, and fitting the facts in those cases, but not the facts in this case, petitioners even try to show that respondent, instead of suffering a loss by the Saigon's refusal to take the deckload, actually made a gain. They in effect tell Mr. Wheelwright, who has been exporting lumber for twenty-three years, that he doesn't know his business and can't tell a profit from a loss.

Respondent's lost profits are known to a mathematical certainty. It would lighten the labors of judges, if, in all cases, the damages were so easily ascertainable. They are shown on libelant's exhibit "L," Ap. 123, and are calculated by adding to the price paid for the lumber in Portland the cost of getting it to Bombay, and subtracting the sum of these two from the price received in Bombay. The result shows a profit of $7.995 per thousand feet, and in consequence, a loss of this much to the respondent for every thousand feet the Saigon left behind.

But the petitioners, taking from other cases the rule that the measure of damages is the market price at port of destination at date the goods should have arrived there, less the market price at port of shipment *on same date*, plus cost of transportation from port of shipment to destination, reason thus: The sale price at Bombay, August 2nd, was $70.275

per thousand; the market price at Portland *on same date,* plus cost of transportation, was $78.401; hence respondent lost on each thousand feet shipped the difference between these two, or $8.1251 (Petitioners' brief, before the Circuit Court of Appeals, pp. 203-207); or, figuring it a slightly different way, the loss per thousand feet shipped was $4.625 (Petitioners' same brief, p. 208). Consequently the Saigon did respondent a favor by refusing to take a full deckload, and respondent showed base ingratitude by bringing this suit. Petitioners' brief, pp. 98-99.

That sounds fantastic but it actually is petitioners' position. Merely to state it is enough to discard the rule of damages for which they argue. Petitioners' error is due to their ignoring the fundamental *principle* of the law of damages. This *principle* is *due compensation,* and every *rule* for measuring damages is subordinated to this principle, and if any rule does not fulfill the principle the rule is discarded in favor of one that does. Sutherland makes this clear as follows:

> "The universal and cardinal principle is that the person injured shall receive a compensation commensurate with his loss or injury and no more; and it is a right of the person who is bound to pay this compensation not to be compelled to pay more, except costs. * * * The principle of just compensation is paramount. By it all rules on the subject of compensatory damages are tested and corrected. They are but

aids and means to carry it out; and when in any instance such rules do not contribute to this end, but operate to give less or more than just compensation for actual injury, they are either abandoned as inapplicable or turned aside by an exception."

Sutherland on Damages, 4th Ed., Vol. 1, pp. 47-48.

"Doubtless it is essential, in order to bring within the contemplation of the parties damages *different from and larger in amount* than those which usually ensue, that the special circumstances out of which they naturally proceed shall have been known to the party sought to be made liable in such manner, at the time of contracting, as to make it manifest to him that if compensation in case of a breach on his part is accorded for actual loss, it must be for a loss resulting from that special state of things which those circumstances portended. Damages are not the primary purpose of contracts, but are given by law in place of and as a compensation and equivalent for something else which had been agreed to be done and has not been done. What the damages would ordinarily be on such a default is immaterial if the contracting party assumed the obligation he has broken with a knowledge of a peculiar state of facts connected with the contract which indicate that other damages would result from a breach, and the latter

are claimed. To confine the injured party's recovery in such case to the *lighter* damages which usually follow such a breach, where no such known special facts exist, and exclude those which were thus brought within the contemplation of the parties, would be to sacrifice substantial rights to arbitrary rule; to set aside the principle which entitles a party to compensation commensurate with his injury to give effect to a rule formulated to render that principle effectual; it would be to apply a subordinate rule where it has no application instead of the principle which is paramount and always applicable. What are the usual damages which result from the breach of a contract? *There is certainly no customary amount, nor is there any rule of damages which is universal like the principle for allowance of due compensation.* If it is a contract of sale and the vendor refuses to complete it, one rule is to ascertain that compensation by the difference between the contract price and the market value, because if the article which is the subject of the contract can be obtained in market at a market price the vendee is thereby enabled to supply himself without loss unless the price has increased. That rule goes no further, but the principle does. Where the vendee cannot obtain the article in the market, nor at all if the vendor refuses to perform his contract, that rule is not applicable, and then resort must be had to other elements

of value; and recourse is had to the principle to determine the measure of redress; *even a contract of resale made by the vendee and of which the vendor had no notice may be considered.*"

Sutherland on Damages, 4th Ed. Vol. 1, pp. 202-204.

The above quotations make it amply clear that the *principle* of just compensation is the paramount thing, and that all *rules* for measuring damages are subordinate to it and give way when they do not do justice.

Indeed the quotation from Judge Taft's decision in The Oregon, 55 Fed. 666, on page 92 of petitioners' brief, states the principle concisely:

"The pecuniary difference between the shippers' condition with the contract performed and his condition if the merchandise is not shipped, but remains at the port of shipment, is * * * * his legal damage."

In this case the owners of the Saigon Maru sold the respondent "space" in the vessel. They sold "transportation," just like any other commodity. If there had been any market price for "space," if vessels had been abundant and respondent could have bought "space" elsewhere to ship the cargo that was left behind, the difference between the price of the additional "space" it bought and the

contract price it paid for "space" on the Saigon Maru might have been adopted as the fair measure of damages. But the war had so disorganized shipping that there was practically no other "space" available. If we had got it we would have paid abnormal prices for it and would have thus penalized the owners of the Saigon Maru in an excessive amount of damages. We would have been liable to the charge that we did not keep our damages down to a minimum as obliged to do. We adopted instead a measure of damages which is not only much less in amount, but which is definite and certain. The profits that we have lost and our liability to Gillanders are amounts of exact calculation, and if these are taken as the measure of damages, justice will be done us and no injustice will be done the Saigon Maru or her owners.

Respondent claimed damages in the lower court as follows:

1. Loss of profits on 508,441 feet left behind, at $7.955 per thousand—$4,044.65.

2. Liability to Gillanders, £1,075 and 4,550 rupees, expressed in American dollars.

Judge Wolverton allowed

1. Loss of profits on 308,411 feet left behind at $7.955 per thousand—$2,453.65 (Ap. 910-11, 928).

2. Liability to Gillanders £1,075 at $3.48¼ each and 4,550 rupees at 31.85 cents, the rate of exchange at date of decree—$5,192.86. (Ap. 928.)

I have already shown how we calculate the lost profits (Libelant's Exhibit "L," Ap. p. 123).

Gillanders' loss, claimed against respondent, is shown in the depositions of Clapham and Hunter (Ap. 670-707). In brief, these damages were made up as follows: The contract of sale was for 5,500 tons, ten per cent more or less. Deducting the ten per cent makes 4,950 tons, the minimum to be furnished. The ship carried only 4,550 tons. Consequently there was a shortage of 400 tons. The difference between the market price at Bombay on August second and the price at which Gillanders had bought the lumber was 2 pounds, 13 shillings, 9 pence per ton of 50 cubic feet. This amount, multiplied by the amount short (400 tons) equals £1,075. The additional claim of 4,550 rupees for failure to carry the long lengths is the lesser amount stated by Clapham and Hunter on this account. They estimate these damages at 1 to 2 rupees on the quantity delivered. We have used 1 rupee instead of 2 in making our calculation. The normal rate of exchange for a rupee is thirty-two cents.

At the time the court made its decree, the rate of exchange was $3.48¼ per pound sterling, and 31.85 cents per rupee, and that part of the decree covering

the Gillanders' claim was for $5,192.86, being the equivalent of £1,075 and 4,550 rupees at these rates of exchange. If your Honors affirm the decree below, then the mandate should direct a new decree to be entered based on the rates of exchange prevailing when such new decree is entered, and if the parties cannot stipulate the amount, then testimony before the District Judge should be permitted on the subject. We also ask that interest be allowed us.

Now counsel complains of all these damages as "special" and not within the contemplation of the parties, and his complaints may be segregated thus:

1. The $11.50 base price paid by respondent for the lumber was a *March* price, and was unknown to petitioners, and since it was lower than the *June* price, or the *August* price it is not fair to allow respondent to calculate his profits from it.

2. The charter was made several hours before the sale to Gillanders was consummated; consequently the charterers, while they knew of an intention to sell, did not know of an actual completed sale when they chartered the vessel and cannot be liable over for Gillanders' claim.

As to the first point: No one can read the correspondence between Mr. Wheelwright and Mr. Orrett leading up to the charter party without believing that Mr. Orrett knew or should have known that respondent was buying the lumber in March.

It is perfectly plain that Mr. Wheelwright was conducting a business transaction in three parts, each dependent on the others. He was:

1. Selling the lumber in Bombay if he could charter a ship to take it there.

2. Chartering a ship for Bombay if he could sell the lumber there.

3. Buying the lumber in Portland if he could get the ship and make the Bombay sale.

Anyone would have known that when he got the ship and made the sale (in March) he would immediately have to place his order at the mill so that the mill could begin to cut on the Adneci schedule (which had been furnished Orrett). Ap. p. 73.

What means Wheelwright's letter of March 9th to Orrett (Ap. 71) "we can supply a cargo at not more than two loading points on the Columbia-Willamette Rivers lay days *April 15th* or thereabouts," unless it means that he would have to order the lumber according to the Adneci schedule enclosed in the letter, as soon as the charter was signed? The mill couldn't get it out for April 15th unless it was ordered in March.

What does Orretts' telegram to respondent, March 13th (Ap. 74) "Bombay lumber *April*-May loading will take full cargo for Saigon * * * *lessen* long stuff as much as possible" mean? unless it means that he knew the cargo would be in process of cutting by the mill, and the lengths could there-

fore be lessened, and that the whole cut would have to be completed by April 15th?

See also Orretts' letter of March 19th (Ap. 77) "I ask that you restrict the lengths to a reasonable minimum."

Yet in the face of this counsel says in his brief, p. 98:

> "The 'joker' in Mr. Wheelwright's statement (Libelant's Exhibit 'L,' Ap. 123) is this item: 'June 7th, Lumber 2,729,005 ft. @ $11.50 base, less 2½ per cent twice, $34,131.54.' When this statement was introduced in evidence nothing was said by the witness as to when this lumber was actually purchased. It was not until he was asked on cross examination the direct question as to when he bought the lumber that it was disclosed that the purchase price had been fixed by a sale contract made in the preceding March."

In view of the correspondence I have referred to above, think of accusing Mr. Wheelwright of leaving it to be inferred that the purchase was made about the 4th of June. As a matter of fact the ship *commenced loading May 26th* and sailed on June 4th.

But all this is of little consequence, for it is not at all necessary for the collection of these damages that petitioners should have known just when re-

spondent bought this cargo, or what he paid for it. It is enough that he knew that Mr. Wheelwright had chartered this ship for the express purpose of fulfilling this sale in Bombay, and was likely to lose his profits and render himself liable to his purchaser if the ship failed him. It is not necessary that petitioner should have known the details of the transaction or just what the profits would be. That is carrying the rule in Hadley against Baxendale entirely too far. It is a common sense rule—not an antique formula designed to thwart justice. Counsel himself states it on page 192 of his brief as follows:

> "The damages recoverable in such cases are such as may fairly and reasonably be considered either as arising naturally from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

I have no quarrel with that, nor with the further statement of the rule by counsel—it being merely an additional exposition of the part I have quoted. I adopt his own words—such damages "as may *reasonably* be *supposed* to have been in the contemplation of both parties at the time they made the contract," and ask your Honors whether you can read the correspondence between Wheelwright and Orrett leading up to the charter party (Ap. pp.

69-82) without saying that Orrett knew Wheelwright was selling the lumber if he could get the ship, and was chartering the ship if he could sell the lumber, and that each transaction was absolutely dependent on the other, and that the moment he closed those two he had to buy the lumber in Portland so the mill could commence cutting? Though as to that latter fact, I dont' think it important whether Orrett knew it or not. In fact we don't have to prove that Orrett *knew* anything. It is enough if we prove that he must, when he made the charter party, be *"reasonably supposed"* to have had in contemplation that Wheelwright was chartering the ship to fulfill a sale of lumber which he was then making in Bombay, and that if the ship failed, Wheelwright would lose his profits and be liable to his purchaser for breach of the contract of sale. That is all Orrett need be reasonably supposed to have had in contemplation. He need not know the exact amount of profits, nor when Wheelwright bought the lumber, nor what he paid for it, nor what he sold it for, nor how much he would owe Gillanders as a result of a breach. That, as I said, would be carrying the rule beyond common sense.

As to the second point—that the sale to Gillanders was not consummated till several hours after the charter party—I feel I have already answered that in what I have just written. For whichever was completed first, is there any doubt as to what damages Orrett must have had in mind

as likely to flow from a breach? Your Honors are not going to make the law so absurd as to say that Orrett can lead Wheelwright into this venture (remember it was Orrett who opened the negotiations by his telegram, "Have you any inquiries or do you know of any offers for lumber for Bombay; subject to proper inducements we might put boat on berth May loading" Ap. 69), and get Wheelwright to sell the lumber in Bombay and charter the ship to carry it there, and then, having been kept fully informed throughout the whole negotiations of the special purpose for which the ship was wanted, escape the damages because the final closing of the sale was some hours after the final closing of the charter. The law is not an absurd science, nor, with all its technicality, so hairsplitting as that. Its aim is justice.

I don't care anything about it, but it may be remarked in passing that as a matter of fact the sale of lumber was closed before the ship charter. Mr. Wheelwright in one place states the contrary, but his later testimony, when he had the actual cables before him, was that the sale was closed first—by his cable using code word meaning "we conform to contents," etc. (Ap. pp. 336-339, especially 338, 339.) This shows that the sale was consummated March 17th. The charter party was not finally closed on that day because some details still remained unsettled. It appears to have been finally closed March 20th. (Ap. 344-346.) It bears date March 19th (Ap. 976).

ARE THESE DAMAGES SPECIAL?

The rule against special damages, unless they were in the contemplation of the parties refers to damages that are *extra* and exceptional, and in *addition* to the general damages. The rule has its foundation in the just thought that it is not fair to tie a man up in a contract, and then hold him for extra and unusual damages growing out of exceptional circumstances, which, had he known them, would have prevented him from entering into the contract, or, at least from entering into it without an increased consideration to compensate him for the extra risk.

But the whole reason for the rule fails, when, as in this case, the damages, though "special" in that they represent lost profits, etc., are really *less* than the general damages would have been, and are substituted for the general damages.

As I have said before, the owners of the Saigon sold to the respondent "transportation" to Bombay —they sold "space" in their vessel. In normal times there is a known market value for "space," and ordinarily the measure of damages would have been the extra amount it would have cost respondent to go out in the market and buy "transportation" or "space" for the left-behind cargo. If respondent could have got it transported on another vessel, at the same rate, to arrive at Bombay at the same time, there would have been no damage; if at a higher rate, then the amount of the excess would be the damage. But, as Mr. Wheelwright explained

(Ap. 127-128), these were war times, ships were scarce, "space" was unobtainable. Even if it could have been bought at all, the extra cost would have been at least $15,000.00. But it could not be had. Instead of claiming $15,000.00, we have minimized our damages, which, though *called* "special" are less in amount than general damages would have been. Hence, any rule against "special" or "exceptional" damages becomes here immaterial.

In this connection let me call attention to a case mentioned by Judge Wolverton in his opinion (Ap. p. 908)—*Strom Bruks Aktie Bolag v. Hutchison*, Aspinwalls' Reports, Vol. 10, N. S., pp. 136, 140-141. In this case the owners of a vessel did not furnish it as agreed and the charterers, who had sold the cargo to a third person, paid that third person the damages for non-delivery of the cargo and sued the owners of the ship to recover. On the contention of the defendants that the damages were special and should not be allowed, the court said:

> "It seems to me that this argument is really founded on an inaccurate use, or perhaps I should say a less accurate application of the terms 'special damages' and 'general damages.' That division of damages is more appropriate, I think, to cases of tort than to cases of contract. 'General damages,' as I understand the term, are such as the law will presume to be the direct natural or probable consequence of the

act complained of. 'Special damages,' on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and therefore they must be claimed specially and proved strictly. In cases of contract special or exceptional damages cannot be claimed unless such damages were within the contemplation of both parties at the time of the contract. Now, the appellants are not claiming here exceptional damages. They are claiming nothing but ordinary damages ascertained and limited by the special circumstances of the case. No doubt they are claiming over against the respondents the damages which they have had to pay to Thomas Owen and Co. But if there had been no contract at all between the appellants and Thomas Owen and Co., and Thomas Owen and Co. had made a similar contract with some third person who failed to perform his bargain, and Thomas Owen and Co. had bought against that third person just as they did against appellants, their purchases would have been the best evidence possible of the measure of damages resulting from the respondents' breach of contract. I am unable to see what difference it can make whether you claim damages generally and show that an award of general damages would include and cover a special loss for which you seek relief or whether you seek compensation for a special

loss and show that the loss would be more than covered or compensated by an award of general damages." (Ap. pp. 140-141.)

APPELLANT'S OBJECTION THAT RESPONDENT HAS NOT PAID GILLANDERS.

Counsel for the Saigon takes the position that respondent was not entitled to recover damages on account of its liability to Gillanders, Arbuthnot & Company since it had not actually paid Gillanders, Arbuthnot & Company and satisfied that liability. It makes no difference in law whether respondent had paid Gillanders, Arbuthnot & Company or not. The respondent, as stated by Mr. Wheelwright on the stand (Ap. 350), recognized the liability and if, on account of the business dealings between Gillanders and respondent and the friendly relationship existing between them, or from whatever cause the Gillanders firm allowed respondent to postpone until the trial of this case payment of Gillanders' damages, it is no affair of the Saigon Maru.

An illustration of this is the case of *Cobb v. Illinois Central Railroad Company,* 38 Iowa, 601, which was an action brought to recover on account of the failure of the railroad to carry a large quantity of oats from Dubuque and other points to Cairo. The plaintiffs were engaged in the business of supplying forage for the United States armies during the Civil War. The court stated "the measure of damages against a carrier for violation of his duty or contract in respect to the transportation of property should be such as to do justice and award full

compensation, and no more, to the party injured. Plaintiffs must be compensated for the profit they would have realized, which is the difference between the price they paid, or contracted to pay for the oats, and the price under their contract with the government, less the freight to Cairo. They must also recover for the sum they paid *or are liable to pay* for the oats purchased by them or agreed to be delivered by the various parties with whom they contracted. If the oats were actually received by them, or were not, and only contracted to be delivered, in either case they must recover for the sums paid by them on account of the oats, *or on account of their liability upon their several contracts to purchase oats.* They must be made whole on account of these outlays, and also, as we have seen, must recover the profits that would have accrued to them." And the court allowed interest on these various sums.

Respectfully submitted,

ERSKINE WOOD,
Proctor for Respondent.